IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1802

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, American Motors Sales Corporation ("AMSC"), submits this brief in reply to the briefs in opposition of respondents.

Respondents Have Incorrectly Stated That This Court Has Already Resolved The Constitutional Issue Raised By This Case.

Respondents rely upon *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, ... U.S. ....., 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978), *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951), and *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), in support of their contention that this Court has already resolved the constitutional issue raised by this case. AMSC submits that those cases do not resolve the issue.

In *Fox*, the only one of the three cases dealing with a statute similar to Va. Code § 46.1-547(d), this Court studiously avoided any reference to or resolution of the Commerce Clause question, which is the only question presented by the instant case.

In *Panhandle*, the requirement of a Michigan statute that Panhandle, a natural gas company, had to obtain a certificate of convenience and necessity from the Michigan Public Service Commission before it could engage in the *retail* sale of natural gas, was upheld because this Court found:

> . . . the sale and distribution of gas to local consumers by one engaged in interstate commerce is "*essentially local*" in aspect and is subject to state regulation without infringement of the Commerce Clause of the Federal Constitution. [Emphasis added.]

341 U.S. at 333.

Panhandle is clearly distinguishable from the instant case. In the first place, the sale of natural gas is a public service business while the sale of automobiles is not. Second, Consolidated Gas Company, the certificated company which Panhandle sought to by-pass, was a public utility company

which, because of the strict regulations to which such companies are subject, was entitled to protection from competition for the "cream of the volume business" while an automobile dealership is not a public utility entitled to such protection. Third, Panhandle's volume of sales in Michigan would not be affected because the gas it proposed to sell directly to industrial customers would be sold by Panhandle to Consolidated which in turn would sell it to the customers. Here, AMSC's sales in Virginia are affected because there is no assurance that an existing dealer would make sales to the same customers that Early, a new dealership, would.[1] Fourth, *Panhandle,* like *Exxon,* involved proposed sales to ultimate users while the instant case involves proposed sales by AMSC to a distributor. Va. Code § 46.1-547.2 prohibits AMSC from selling vehicles directly to the public. While *Panhandle* and *Exxon* might provide some support to the state if that statute were being challenged, they are not applicable here.

It is obvious that this Court considers *direct* sales of gas to industrial customers to be peculiarly local in nature. *See F.P.C.* v. *Trancontinental Gas Corp.*, 365 U.S. 1, 20 (1965), wherein *Panhandle* was cited in support of the rule that "[c]onsuming states may control the end use of gas. . . ."

Finally, in *Exxon,* this Court upheld a Maryland statute that prohibited a producer or refiner of petroleum products from operating any *retail* service station, stating:

> We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a *retail market.* [Emphasis supplied.]

437 U.S. at 127.

[1] Aff. Kessler ¶ 8 (Jt. App. 9.)

Thus, neither *Panhandle* nor *Exxon* deals with restrictions upon the franchising of motor vehicle dealers; rather, they deal with retail sales—an essentially local matter—and are clearly distinguishable in fact and in principle from the instant case.

More important from the standpoint of this petition, the scope of the principles enunciated by this Court in *Exxon* should be clarified. The Fourth Circuit in its opinion below quoted from *Exxon*:

> [The Commerce Clause] protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. 98 S.Ct. at 2215.

592 F.2d at 223. In the context of this case, the effect of the statute on the interstate market can only be measured by its effect on interstate firms. If it prohibits or burdens an interstate transaction between AMSC and a proposed dealer, it necessarily burdens the interstate market. However, the Fourth Circuit, after quoting the above holding of this Court, concluded:

> Tested by the principles explained in *Exxon,* we conclude that the Virginia statute imposes no unconstitutional burden on interstate commerce. The public in the Orange market area may buy as many Jeeps as Waugh can sell. If Waugh does not pursuade potential purchasers to buy Jeeps, they can buy competitive vehicles. Conversely, American and its competitors can supply the market with all the four-wheel drive vehicles that it will absorb. The statute may affect the structure of the *retail* market by shifting business from one out-of-state manufacturer to another. But, when a statute is otherwise valid, the commerce clause does not insulate this aspect of trade from state regulation. *Exxon,* 98 S.Ct. at 2215. [Emphasis supplied.]

592 F.2d at 223.

If such analysis of *Exxon* is correct, then the protection of the free flow of commerce among the states afforded by the Commerce Clause has been substantially eroded. Barriers which have been dismantled by prior decisions can again be erected. As long as a particular *type* of product is available to the public from *any* out-of-state manufacturer, and as long as a particular manufacturer has at least one outlet in a "market area", then, under the analysis of the Fourth Circuit, there would be no violation of the Commerce Clause. For example, a statute making it unlawful for any manufacturer of motor vehicles (or any other product) to grant an additional franchise in a trade area already served by a dealer would pass Commerce Clause muster. Paraphrasing the language of the Fourth Circuit, the public could buy as many vehicles of the line-make as the existing dealer could sell; if the existing dealer could not persuade purchasers to buy the line-make handled by him, they could buy competitive vehicles; and the manufacturer and its competitors could presumably supply the market through existing dealers with all the vehicles it could absorb. Thus, following the reasoning of the Fourth Circuit, such a statute would affect only the structure of that retail market.

AMSC submits that Va. Code § 46.1-547(d) directly and primarily affects the interstate market by placing unconstitutional burdens upon it and that any effects upon the retail market are indirect and secondary. AMSC further submits that this Court did not intend that its holding in *Exxon* should be applied in the manner in which the Fourth Circuit applied it. Such an application is directly in conflict with the principles enunciated in the decisions of this Court in *Buck* v. *Kuykendall*, 267 U.S. 307 (1925), and *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949).

In *Hood*, a statute which the District Court in the present case described as "almost identical in effect" to Va. Code

§ 46.1-547(d) was invalidated under the Commerce Clause. There, the State of New York, like the Fourth Circuit, reasoned that:

> . . . denial of the license for a new plant does not restrict or obstruct interstate commerce, because petitioner has been licensed at its other plants without condition or limitation as to the quantities it may purchase. . . . [B]y increased efficiency or enlarged capacity at its other plants, petitioner might sufficiently increase its supply through those facilities.

336 U.S. at 339.

In rejecting the above argument, this Court stated:

> But the argument also asks us to assume that the Commissioner's order will not operate in the way he found that it would as a reason for making it. He found that petitioner, at its new plant, would divert milk from the plants of some other large handlers in the vicinity, which plants "can handle more milk." This competition he did not approve. He also found it would tend to deprive local markets of needed supplies during the short season. In the face of affirmative findings that the proposed plant would increase petitioner's supply, we can hardly be asked to assume that denial of the license will not deny petitioner access to such added supplies. *While the state power is applied in this case to limit expansion by a handler of milk who already has been allowed some purchasing facilities, the argument for doing so, if sustained, would be equally effective to exclude an entirely new foreign handler from coming into the state to purchase.* [Emphasis supplied.][2]

[2] The logical extension of the Fourth Circuit's application of the holding in *Exxon* that "[the Commerce Clause] protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations" would be that the State of Virginia could totally prohibit AMSC from establishing *any* Jeep vehicle dealerships in Virginia so long as some other manufacturer was supplying the market with four-wheel drive vehicles.

Id. at 540.

The reasoning of this Court in *Hood* is equally compelling in the present case, where there is evidence that the establishment of a new dealership in the Orange, Virginia market area would increase the total number of Jeep sales in that area.[3]

Accordingly, the petition for certiorari should be granted so that this Court can clarify the scope of its holding in *Exxon* that "[the Commerce Clause] protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations," and settle the important and complex question of constitutional law presented by the instant case.

CONCLUSION

For the reasons stated herein and in the petition, a writ of ceritorari should issue to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,
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July 13, 1979

[3] See Aff. Kessler ¶ 8. (Jt. App. 9). Neither the Commissioner's findings of fact nor his conclusion that there is "reasonable evidence" that the market area "will not support all the [Jeep] dealerships in the trade area" if the additional franchise were granted refutes such evidence. Thus the Commissioner did not find that AMSC could make such additional sales through Waugh, the existing dealership.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 1979, three copies of the Reply Memorandum of Petition were mailed, first class postage prepaid, to the Honorable J. Marshall Coleman, Attorney General of the Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219, counsel for respondents Division of Motor Vehicles of the Commonwealth of Virginia and Vern L. Hill, Commissioner of the Division of Motor Vehicles of the Commonwealth of Virginia, and to David F. Peters, Esquire, and Dale A. Oesterle, Esquire, Hunton & Williams, P. O. Box 1535, Richmond, Virginia 23212, counsel for respondent Virginia Automobile Dealers Association. I further certify that all parties required to be served have been served.

Respectfully submitted,

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